

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NATHON JAMES ELZER,

Defendant-Appellant.

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UNPUBLISHED

April 16, 2015

No. 320569

Grand Traverse Circuit Court

LC No. 13-11705 FC

Before: OWENS, P.J., and JANSEN and MURRAY, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of first-degree criminal sexual conduct (CSC I), MCL 750.520b(2)(b), and three counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(2)(b). He was sentenced to 30 to 60 years' imprisonment for the CSC I conviction 10 to 15 years' imprisonment for the CSC II convictions. Defendant appeals by right. We affirm.

I. FACTS

The six-year-old complainant testified that defendant sexually assaulted her on numerous occasions. She said that defendant would come into her bedroom at night and digitally penetrate her vagina, force her to perform oral sex on him, and force her to draw on his penis with color markers. Three witnesses testified that defendant had previously committed acts of sexual misconduct with them while they were minors. One, defendant's half-sister, testified that defendant began paying her for sexual favors when she was approximately 12 years old and continued to pay her for sexual favors, most recently in 2013 when she was 24 years old.

II. MCL 768.27a(1)

Defendant's sole argument is that the lower court should not have admitted the testimony regarding his previous acts of sexual misconduct and that its admission denied him his due process right to a fair trial.

Defendant objected to the admission of this evidence and the trial court found it admissible under MCL 768.27a(1), and found that it was more probative than prejudicial. However, defendant did not object to admission of evidence from his half-sister on the basis that

the sexual activity continued with defendant into her adulthood. To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001) (citations omitted). Defendant also failed to object on due process grounds. Therefore, the evidentiary issue is partially preserved and the due process issue is unpreserved. This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Adair*, 452 Mich 473, 485; 550 NW2d 505 (1996) (citation omitted). An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Unpreserved constitutional and nonconstitutional issues are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Preliminarily, defendant has a constitutional right to a fair and impartial trial. *People v Conley*, 270 Mich App 301, 307; 715 NW2d 377 (2006). However, in *People v Whittaker*, 465 Mich 422, 426; 635 NW2d 687 (2001), the Court held that the erroneous admission of evidence is a nonconstitutional issue. Thus, even if there were error, it would not implicate defendant's right to due process. Regardless, there was no evidentiary error and thus, no denial of the due process right to a fair trial.

In a case in which the defendant is accused of committing a listed offense against a minor, the prosecution can introduce evidence that the defendant previously committed a listed offense against a minor for any purpose to which it is relevant. MCL 768.27a(1). A "listed offense" is a tier I, II, or III offense, as defined in the sex offenders registration act. MCL 768.27a(2)(a). Such offenses include sexual penetration with a minor, sexual contact with a minor, indecent exposure to a minor, and solicitation of a minor for immoral purposes. MCL 28.722(s)(ii); MCL 28.722(u)(i); 28.722(w)(iv). MCL 768.27a(1) supersedes the prohibition against propensity evidence contained in MRE 404b. *People v Watkins*, 491 Mich 450, 490-491; 818 NW2d 296 (2012). However, any evidence introduced under the statute is still subject to the balancing test of MRE 403. *Id.* Therefore, evidence of a defendant's previous act of sexual misconduct with a minor that qualifies under MCL 768.27a(1) may nonetheless be inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice. *Id.*

The evidence of defendant's previous acts of sexual misconduct with minors qualified under MCL 768.27a(1). One witness testified that defendant penetrated her vagina with his fingers, external objects, and his penis when she was approximately nine years old. These acts qualify as listed offenses under MCL 28.722(w)(iv). Another witness testified that defendant showed her his penis, offered to pay her for sex, and paid her to expose her breasts when she was 12 years old. These acts qualify as listed offenses under MCL 28.722(s)(ii) and MCL 28.722(u)(i). Finally, the third witness testified that defendant showed her pornographic magazines and paid her for oral and vaginal intercourse beginning when she was six years old. These acts qualify as listed offenses under MCL 28.722(u)(i) and MCL 28.722(w)(iv).

However, as defendant properly notes, MCL 768.27a(1) only includes listed offenses committed against minors. Therefore, the third witness's testimony regarding sexual acts committed after she became an adult was not admissible under the statute. But, for at least two reasons, the error did not affect defendant's substantial rights. First, the testimony was negligible compared to the mass of evidence establishing that defendant had committed the

charged offense. The complainant and three witnesses all testified that defendant sexually abused them when they were minors. Second, the acts of sexual misconduct before and after the witness turned 18 were the same. It is unlikely that the jury would have considered the sexual acts defendant committed after she turned 18 in a substantially more negative light.

Evidence of defendant's previous acts of sexual misconduct with minors did not violate MRE 403 because, as the trial court found, its probative value was not substantially outweighed by the danger of unfair prejudice. First, as allowed by MCL 768.27a(1), the evidence was relevant and probative because it showed defendant's propensity to sexually abuse young girls. Second, it supported the complainant's credibility, which defendant placed at issue when he argued that her grandmother had convinced her to falsely accuse him of sexual assault. Third, it established defendant's system of befriending young girls, getting them alone, and then committing sexual assaults. Finally, although evidence introduced under MCL 768.27a(1) will be prejudicial, given the disturbing nature of the charged offense and the similarity of the previous sex crimes committed by defendant, the prejudicial effect of the evidence did not outweigh its probative value. Admission of these other acts was not an abuse of discretion.

Affirmed.

/s/ Donald S. Owens  
/s/ Kathleen Jansen  
/s/ Christopher M. Murray